No. 75-1572

In the Supreme Court of the United States

OCTOBER TERM, 1976

APACHE COUNTY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

MOTION TO DISMISS OR AFFIRM

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CITATIONS

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Pursuant to Rule 16(1)(a) of the Rules of this Court, the United States moves the Court to dismiss this appeal or, alternatively, to affirm summarily.

OPINION BELOW

The opinion of the district court (J.S. App. 1-7) is not yet reported.

JURISDICTION

The opinion and judgment of the three-judge district court was filed on September 16, 1975. In two orders filed on February 19, 1976, the court denied appellants' motion for rehearing (J.S. App. 8) and

ordered its opinion and judgment implemented (*id.* at 9–11).[1] A notice of appeal was filed on March 4, 1976 (*id.* at 14–15), and the jurisdictional statement was filed on April 27, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 42 U.S.C. 1971(g).

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction over appellants' direct appeal from an order of a three-judge district court dismissing their counterclaim, without consideration of its merits, on the ground that it was premature.

2. Whether Sections 1 and 2 of the Fourteenth Amendment prohibit Congress from declaring reservation Indians to be citizens of the United States.

3. Whether the trial court correctly dismissed appellants' counterclaim, contending that they had been denied due process and equal protection, as premature for adjudication.

STATEMENT

This appeal arises from a judgment entered in two consolidated cases involving the apportionment of supervisorial districts in Apache County, Arizona.

1. Apache County is a political and geographic subdivision of the state of Arizona (J.S. App. 1). The county is governed by a Board of Supervisors with general governmental authority whose functions, by statute, include the task of dividing the county into

[1] Paragraphs 3 and 4 of the order implementing the judgment were amended, *nunc pro tunc*, in a Supplemental Post-Trial Order filed March 22, 1976 (J.S. App. 12–13).

supervisorial districts (*ibid.*).[2] The county has been divided into three such districts, denominated District 1, District 2, and District 3 (*id.* at 1–2). Each is represented on the Board by one supervisor, and each of the three supervisors exercises one vote (*id.* at 2).

According to the 1970 United States census, District 1 has a population of approximately 1,700; District 2, 3,900; and District 3, 26,700 (*ibid.*). A substantial portion of District 3 is composed of land on

[2] Section 11-211(A) of the Arizona Revised Statutes (1974 Cum. Supp.) provides, in part:

"In each county having a population of less than two hundred thousand as determined by the latest United States decennial census, a board of supervisors shall consist of three members * * * who shall be qualified electors of their supervisorial district and who shall be elected at a general election at which the president of the United States is elected."

A.R.S. 11-212 provides:

"The board of supervisors shall meet at the county seat on the first Monday in April next preceding a general election in which the president of the United States is elected, and divide the county into three or five supervisorial districts as provided in this article, which shall be numbered respectively, districts one, two and three or districts one, two, three, four and five. The board shall define the boundaries and limits of each district and make such division equal or as nearly equal in population as is practicable."

A.R.S. 11-213(A) provides, in part:

"At the general election for state and county officers, one supervisor shall be elected from each district from among those nominated at the preceding primary election. They shall be nominated and elected by the qualified electors of their respective districts."

The powers and duties of the Board of Supervisors are enumerated in A.R.S. 11-251 *et seq.* These include the authority to "[e]stablish, abolish and change election precincts, appoint inspectors and judges of elections, canvass election returns, declare the result and issue certificates thereof." A.R.S. 11-251(3).

the Navajo Indian Reservation, and 23,600 of the 26,700 persons residing within the boundaries of District 3 are Indians (*ibid.*). Of the 3,900 persons residing within District 2, 300 are Indians; and of the 1,700 in District 1, 70 are Indians (*ibid.*).[3] Only non-Indians have been counted in the apportionment of the supervisorial districts (J.S. 7).

2. On October 15, 1973, five of the appellees herein, Navajo Tribal Indians[4] residing within the territorial limits of District 3, filed a complaint in the United States District Court for the District of Arizona, against Apache County, and the members and clerk of its Board of Supervisors. The complaint alleged that "[t]he acts of defendants in establishing the supervisorial districts of Apache County debase the value of plaintiffs' votes in violation of their rights under the Fourteenth Amendment and under 42 U.S.C. §§ 1981 and 1983" (Complaint at 2).[5] Plaintiffs sought a declaration "that the present Supervisorial Districts of Apache County are unlawful" (*id.* at 3), and an injunction directing the development and immediate implementation of "a redistricting plan dividing Apache County into Supervisorial Districts of substantially equal population" (*id.* at 2–3).

[3] The district court did not distinguish between reservation Indians and non-reservation Indians in these figures.

[4] The other parties disagree over whether all five of the plaintiffs in the first suit filed are Navajo Reservation Indians (compare J.S. 7 with Motion to Dismiss or Affirm of Appellees Goodluck, *et al.* at 2 & n. 1), but resolution of that disagreement is unnecessary for disposition of this appeal.

[5] We are lodging, with the Clerk, copies of this complaint and all other pleadings in both cases.

In their Answer and Counterclaim, the appellants contended, *inter alia,* that "United States and Arizona citizenship is a prerequisite to becoming a qualified voter and consequently to be counted among the population upon which supervisorial apportionment is founded" (Answer and Counterclaim at 3);[6] that neither the plaintiffs nor any Navajo Reservation Indians are citizens under the Fourteenth Amendment or residents of Apache County (*ibid.*); and that 8 U.S.C. 1401(a)(2) and A.R.S. 16–101 (1975)[7] are unconstitutional insofar as they purport, respectively, to make the private appellees citizens, or allow them to vote and be counted as part of the population for the purpose of apportioning Apache County supervisorial districts (*id.* at 3, 5).

Additionally, appellants asserted that, since most of the people in District 3 are reservation Indians and thereby not subject to the same responsibilities and penalties as either non-Indians or Indians residing elsewhere (*id.* at 3, par. 2), permitting them to vote or be counted for apportionment purposes debases the

[6] The district court did not discuss the language of Section 11–212, Arizona Revised Statutes, providing that supervisorial districts be "equal or as nearly equal in *population* as is practicable" (emphasis added). That provision does not seem to require that persons be voters in order to be counted for apportionment purposes, and plaintiffs, therefore, may be entitled to reapportionment whether or not they may vote. However, plaintiffs in both cases presumably were concerned not only that Indians be counted, but that qualified Indians be permitted to vote, and the district court properly addressed the question whether Indians are entitled to vote in the reapportioned districts.

[7] These statutes are reproduced at J.S. App. 17–20.

vote of non-Indians and subjects them to potential deprivations of equal protection and due process (*id.* at 4–5, pars. 5–8, 10). Accordingly, invoking 42 U.S.C. 1981–1983, appellants "counterclaimed" in their individual capacities for a declaratory judgment that, to the extent that they give reservation Indians a right to vote, 8 U.S.C. 1401(a)(2) and A.R.S. 16–101 are unconstitutional, and sought an injunction against their enforcement. In an amended counterclaim, filed January 21, 1974, appellants also requested injunctive relief against the Attorney General of the United States (Answer and Amended Counterclaim at 3) and various state and local officials having responsibilities in connection with registration of voters (*id.* at 3–4). Finally, appellants asked that a three-judge court be convened pursuant to 28 U.S.C. 2281 and 2282 (*id.* at 6).

3. On January 23, 1974, the United States instituted a second suit against the same appellants, alleging that the existing Apache County apportionment plan, and the 1972 election held pursuant to it, violated 42 U.S.C. 1971(a)(1), 1971(a)(2)(A), and 1973, and the Fourteenth and Fifteenth Amendments. This complaint sought an order requiring the appellants to reapportion the Apache County supervisorial districts without regard to race or color (U.S. Amended Complaint, at 4–5).

Appellants' answer to this complaint raised, as a defense, the same contentions raised by way of defense and counterclaim in the first suit and asked that the merits of these consolidated cases be heard and determined by the three-judge court already designated[8] (Defendants' Answer to U.S. Amended Complaint).

4. These cases were heard on cross-motions for summary judgment. On February 19, 1976, the district court granted the motions of the private appellees and the United States, denied appellants' motion, and dismissed their counterclaim. The court directed the members of the Board of Supervisors to reapportion Apache County's supervisorial districts in a manner consistent with the principle of one-person, one-vote (J.S. App. 9–10).

The court rejected appellants' contention that 8 U.S.C. 1401(a)(2) is unconstitutional insofar as it makes Indians citizens of the United States at birth (J.S. App. 3–6), and found appellants' equal protection and due process arguments "premature for adjudication" (J.S. App. 7).

Appellants' motions for a stay pending appeal were denied by the three-judge court and by Mr. Justice Rehnquist.

ARGUMENT

I

APPEAL DOES NOT LIE IN THIS COURT FROM A DECISION BY A THREE-JUDGE COURT THAT A CLAIM IS PREMATURE

The only basis for convening a three-judge court in this case was appellants' counterclaim for an injunction against the enforcement of the Act conferring citizenship on Indians (8 U.S.C. 1401(a)(2))

[8] A three-judge court had been designated to hear the suit filed by appellees Goodluck, *et al.* on April 8, 1974.

and Section 16–101, Arizona Revised Statutes, which sets forth the state requirements for qualified voters. Since the three-judge court effectively dismissed this claim on a finding that appellants' "equal protection and due process arguments appear to be premature for adjudication" (J.S. App. 7), an appeal properly lies only to the appropriate court of appeals. *MTM, Inc.* v. *Baxley,* 420 U.S. 799; *Gonzalez* v. *Automatic Employees Credit Union,* 419 U.S. 90. This direct appeal therefore should be dismissed.

A. NEITHER COMPLAINT IN THESE CASES REQUIRED THE CONVENING OF A THREE-JUDGE COURT

The initial suit filed by the private appellees, asking the county board of supervisors to reapportion supervisorial districts in conformity with the requirements of Arizona law,[9] did not require consideration by a three-judge district court, for no injunction was sought on grounds of the unconstitutionality of any law. To the contrary, appellees asked that state and federal laws be enforced to provide the requested relief. Similarly, the United States' suit for reapportionment under 42 U.S.C. 1971 and 1973, did not require a three-judge court.[10] While appellants did allege as an

[9] See A.R.S. 11–212, p. 3, n. 2, *supra.*

[10] Appellants are incorrect in their assertion that the three-judge court was "appropriate" under 42 U.S.C. 1971(g) (J.S. 3). That section permits Section 1971 actions to be heard by three-judge district courts only in those instances in which the Attorney General has explicitly requested the court to determine that the deprivation of rights alleged was or is pursuant to a "pattern or practice," as prescribed in 42 U.S.C. 1971(e). No such request or allegation appears in the United States' complaint.

affirmative defense that a judgment for the plaintiffs would deprive them of "Constitutional and Civil Rights," the raising of constitutional matters as a defense,[11] without any request for injunctive relief, is not an adequate basis for convening a three-judge court under 28 U.S.C. 2281 and 2282. Cf. *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144; *Mitchell* v. *Donovan,* 398 U.S. 427; *Goldstein* v. *Cox,* 396 U.S. 471; *Rockefeller* v. *Catholic Medical Center,* 397 U.S. 820. Thus, the jurisdiction of the three-judge court necessarily depended upon appellants' counterclaim.

B. THE DISTRICT COURT DID NOT CONSIDER THE MERITS OF THE COUNTERCLAIM BUT DISMISSED IT AS PREMATURE

The gravamen of appellants' counterclaim [12] is that participation in the political process by tribal In-

[11] Under Arizona law, the individual appellants have the responsibility for apportioning the supervisorial districts (see p. 3, n. 2, *supra*), and were named as defendants in both complaints for this very reason. For the same reason, however, injunctive relief on their counterclaim, if appropriate at all, would run in part against themselves. This anomaly demonstrates that the counterclaim was but an attempt to convert a defense of unconstitutionality into a predicate for a three-judge court.

[12] Appellants' counterclaim quite clearly did not state a claim against the private appellees, none of whom enforces any statutes. It is doubtful that joinder of additional parties (who are not plaintiffs in appellees' suit) can cure that defect. See, *e.g., United States* v. *Techno Fund, Inc.,* 270 F. Supp. 83, 85 (S.D. Ohio); 6 Wright and Miller, *Federal Practice and Procedure,* § 1435, p. 188 (1971 ed.). Appellants did not assert the counterclaim in the action brought by the United States. These questions were not raised in the district court, however.

dians,[13] because they are exempt from certain state taxes and enjoy special privileges by virtue of their unique historic status, is a denial of equal protection and due process to non-Indians. They argue that, should the Indians effectively control county government, they would be in a position to abuse their power to the detriment of non-Indians (J.S. 5, 17–26). Appellants therefore urge that Congress, in passing the Act conferring citizenship on Indians, exceeded its authority under those provisions of Sections 1 and 2 of the Fourteenth Amendment pertaining to citizenship and apportionment[14] (J.S. 11), and that Arizona has relied upon that allegedly unconstitutional enactment in granting Indians the right to vote.

Whatever may be the merit of that position, however, appellants have standing to raise those issues on a counterclaim for affirmative relief only if they can show actual, cognizable harm to themselves.[15] "The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit

[13] As used hereinafter, "Indians" refers to "tribal" or "reservation" Indians unless otherwise specified.

[14] At least implicitly, appellants have also challenged the power of Congress to declare Indians citizens pursuant to Art. I, Sec. 8, Clause iv ("The Congress shall have Power to * * * establish a uniform Rule of Naturalization * * *").

[15] Presumably, defendants have alleged the Fourteenth Amendment issue in their individual, not official, capacities. Whether appellants, in their individual capacities alone, can counterclaim in this kind of action is at least open to doubt. See 6 Wright and Miller, *supra*, § 1404, pp. 16–18, and cases there discussed.

others collaterally." *Warth* v. *Seldin,* 422 U.S. 490, 499. The counterclaim therefore must stand or fall, not on the abstract question whether the Act conferring citizenship on Indians is constitutional,[16] but on whether the Act and the Arizona voting laws together deprive appellants of their constitutional rights. The district court declined to reach that issue, holding only that the Fourteenth Amendment issues "appear to be premature for adjudication" (J.S. App. 7).

Since the district court did not address the issues requiring consideration by a three-judge court, direct appeal does not lie to this Court. *MTM, Inc.* v. *Baxley, supra; Gonzalez* v. *Automatic Employees Credit Union, supra.* In *MTM,* this Court decided that it had no jurisdiction over a direct appeal from an order of a three-judge court dismissing a suit on *Younger* v. *Harris* (401 U.S. 37) grounds, stating (420 U.S. at 804):

> [W]e conclude that a direct appeal will lie to this Court under §1253 from the order of a three-judge federal court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below.

[16] Direct appeal cannot be supported on the theory that the district court declined to enjoin enforcement of the federal statute granting citizenship to Indians. To begin with, the statute is self-executing, and appellants in fact seek a *declaration* that it is unconstitutional, not an order directed to the federal appellees. Furthermore, operation of the federal statute itself causes no harm to appellants. They complain, not simply that Indians are citizens, but that they are citizens entitled to vote in county supervisorial elections. Citizenship alone does not confer that right. A citizen must also satisfy age and residency requirements. See A.R.S. 16–101.

The Court declined to consider not only the merits of the claim but also whether the dismissal itself was justified, saying the correctness of that decision was for the court of appeals to determine, *id.* at 804. Application of that principle to this case is consistent with the limited nature of this Court's appellate jurisdiction. Dismissal for lack of a justiciable controversy, like dismissal for lack of subject-matter jurisdiction, does not require a three-judge court. *Gonzalez* v. *Automatic Employees Credit Union, supra.* A single district judge could have refused to convene a three-judge court or the three-judge court could have dissolved itself and remanded to a single judge for dismissal (419 U.S. at 100, citing *Ex parte Poresky,* 290 U.S. 30). Since that dismissal is not "required to be heard" by a three-judge court, no direct appeal lies under 28 U.S.C. 1253. *Gonzalez, supra,* 419 U.S. at 101.[17]

The Court therefore should either dismiss this appeal or, as the Court did in ***MTM, supra,*** vacate the order of the district court and remand for entry of a new order from which appeal to the court of appeals may be taken.

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[17] While it might be argued that the district court should have resolved whether allowing reservation Indians to vote on its face denies non-Indians due process and equal protection before issuing its reapportionment order, the failure of the district court to reach the merits of this issue is also a matter to be reviewed initially by the court of appeals. *MTM, Inc.* v. *Baxley, supra.*

II

THE DECISION OF THE DISTRICT COURT HOLDING THAT INDIANS ARE CITIZENS ENTITLED TO VOTE WAS CORRECT

Should this Court reach the merits, it should reject appellants' contentions that reservation Indians are not entitled to vote in county elections. Appellants contend, first, that reservation Indians are not, and without a constitutional amendment cannot be, citizens of the United States. They argue further that permitting reservation Indians to vote denies all non-Indians, as well as non-reservation Indians, their rights to due process and equal protection. These contentions do not merit plenary review.

A. CONGRESS HAS THE POWER TO CONFER CITIZENSHIP ON RESERVATION INDIANS

Section 1401(a)(2), Title 8, United States Code, states in part:

> (a) The following shall be nationals and citizens of the United States at birth:
>
> * * * * *
>
> (2) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe.

This provision, originally part of the Nationality Act of 1940, 54 Stat. 1138, was designed to end the continuing uncertainty whether reservation Indians were citizens of the United States. This Court had previously held that Section 1 of the Fourteenth Amendment did not confer citizenship on Indians,

Elk v. *Wilkins,* 112 U.S. 94, and Indians thus had become citizens only by the terms of particular treaties or statutes.[18] While the statutes clearly granted citizenship to Indians living at the time of the Act, it was not clear whether Indians born afterwards were automatically citizens as well. See *Totus* v. *United States,* 39 F. Supp. 7 (E.D. Wash.).

The Nationality Act of 1940 expressly conferred citizenship on reservation Indians at birth, and this Court has recognized that citizenship in numerous cases. See, *e.g., McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164; *Moe* v. *Confederated Salish and Kootenai Tribes,* Nos. 74–1656 and 75–50, decided April 27, 1976. Indeed, appellants do not deny that Congress has granted citizenship rights to Indians; rather they contend (J.S. 11–14) that Congress had no power to do so. Relying on *Elk* v. *Wilkins, supra,* they argue that Sections 1 and 2 of the Fourteenth Amendment permanently foreclosed reservation Indians from citizenship, and further suggest that citizenship for Indians is constitutionally incompatible with their unique status as federal wards.

The novel contention that the Fourteenth Amendment bars reservation Indians from citizenship finds little support in its language or purpose. Admittedly, that Amendment was not designed to *confer* citizenship on Indians, as it did on Negroes, since Indians were then regarded as owing primary allegiance to

[18] U.S. Department of the Interior, *Federal Indian Law,* 517–520 (1958). By 1924, approximately two-thirds of all Indians had acquired citizenship by treaty or statute.

their tribes. See Cong. Globe, 39th Cong., 1st Sess. 2890 *et seq.* (1866). The Court in *Elk* v. *Wilkins, supra,* so recognized. But it does not follow that the Fourteenth Amendment in addition affirmatively and perpetually denied citizenship to Indians regardless of any congressional desire to the contrary. Such a crabbed purpose would be inconsistent with both the language and the generous goals of that Amendment. "As appears upon the face of the [Fourteenth] amendment, as well as from the history of the times, this was not intended to impose any new restrictions upon citizenship * * *. It is declaratory in form, and enabling and extending in effect." *United States* v. *Wong Kim Ark,* 169 U.S. 649, 676. After adoption of the Fourteenth Amendment, as before, Congress retained its historical right to naturalize citizens of the United States.

In any event, even if Section 1 of the Fourteenth Amendment were construed to confine Congress' power to confer citizenship, the underlying legislative history shows that the words "subject to the jurisdiction thereof," contained in Section 1, would exclude from citizenship only those Indians whose tribal membership precluded the necessary loyalty to the United States.[19] At that time Indian tribes were regarded as quasi-foreign nations (Cong. Globe, 39th Cong., 1st Sess. 2893–2897 (1866)), often nations with which the federal government was at war. In 1871, however,

[19] Congress had already ratified numerous treaties, and enacted statutes, declaring certain Indians to be citizens. See note 18, p. 14, *supra.*

Congress declared by statute, 16 Stat. 566, that Indian tribes were no longer to be regarded as foreign nations but were to be governed by Acts of Congress. During the past century Indians have been made subject to various taxes, including federal income taxes (*Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U.S. 418), called to serve in the armed forces (*Totus* v. *United States, supra*), compelled to surrender land under the power of eminent domain (*Federal power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99), and charged with other similar responsibilities. In modern times, unlike the conditions of one hundred years ago, "a general statute in terms applying to all persons includes Indians and their property interests," *Federal Power Commission* v. *Tuscarora Indian Nation, supra,* 362 U.S. at 116. And, as the Court below noted, "Congress' power over the Indian tribes is plenary" (J.S. App. 6). Thus, even if the Fourteenth Amendment could be read as a general limitation on citizenship, it is no longer reasonable to view Indians as beyond the jurisdiction of the United States.

Nor is citizenship for Indians irreconcilable with their continued protection by the federal government. "[I]t is settled that the grant of citizenship to the Indians is not inconsistent with their status as wards whose property is subject to the plenary control of the federal government." *Board of Commissioners* v. *Seber*, 318 U.S. 705, 718. Recently the Court has rejected efforts by several states to impose taxes (without congressional authorization) on reservation

Indians, despite the fact that Indians received state services and were entitled to vote. *McClanahan* v. *Arizona State Tax Commission, supra,* 411 U.S. at 173; *Moe* v. *Confederated Salish and Kootenai Tribes, supra,* slip op. 12. It is well established therefore that Congress need not relinquish its guardianship over reservation Indians as a *quid pro quo* for the granting of citizenship.[20]

B. PERMITTING INDIANS TO VOTE IN COUNTY SUPERVISORIAL ELECTIONS DOES NOT BY ITSELF DENY APPELLANTS DUE PROCESS OR EQUAL PROTECTION

Appellants also argue (J.S. 17–26) that permitting reservation Indians to vote denies non-Indians, such as appellants, their civil rights, including the rights to due process and equal protection. To the extent that this argument depends upon speculation about future events, the district court correctly ruled that the question is prematurely raised (J.S. App. 7). Insofar as appellants may contend that extending voting rights to Indians on its face deprives appellants of constitutional rights, the argument is contrary to well-established precedent of this Court.

This Court has stated plainly that the right to vote need not be contingent, indeed cannot be made contingent, upon all voters having precisely the same degree or kinds of interest in the outcome. The Court

[20] Appellants also contend (J.S. 14–17) that reservation Indians are not residents of Arizona. The Arizona Supreme Court has decided to the contrary, *Harrison* v. *Laveen*, 67 Ariz. 337, 196 P.2d 456, and appellants suggest no persuasive reason why this Court should hold otherwise.

has held that a bachelor must be permitted to vote for members of the school board, *Kramer* v. *Union Free School District,* 395 U.S. 621, and persons without property have a right to vote in bond referenda, though the bonds in question will be serviced largely from a property tax, *City of Phoenix* v. *Kolodzieski,* 399 U.S. 204. To deny Indians the right to vote for county supervisors, appellants would have to prove that the Indians had no stake whatever in decisions made by the Board of Supervisors. That showing has not, and could not, be made. As the private appellees have indicated, Indians affect, and are affected by, the functions of county government in many important respects (Motion at 10–13).

Since Indians are citizens and residents of Apache County, it follows that they must be allowed to vote, on the basis of one-person-one-vote, for the county Board of Supervisors. Accordingly, the district court was correct in ordering the county to be reapportioned.

CONCLUSION

For the reasons stated, the appeal should be dismissed or, in the alternative, the judgment of the district court should be affirmed.

Respectfully submitted.

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SEPTEMBER 1976.

U.S. GOVERNMENT PRINTING OFFICE: 1976